No. 83-300

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

CITY OF LOS ANGELES
DEPARTMENT OF WATER AND POWER,
Petitioner,

vs.

NATIONAL AUDUBON SOCIETY, a corporation;
FRIENDS OF THE EARTH, a corporation;
THE MONO LAKE COMMITTEE, a corporation;
and the LOS ANGELES AUDUBON SOCIETY, a corporation;
Respondents.

REPLY BRIEF OF PETITIONER CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER IN SUPPORT OF PETITION

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INTRODUCTION

None of the briefs responding to our petition contest that the decision below has enormous ramifications in unsettling water rights on which the people and economy of California and the West have long relied. Instead, the arguments in the only briefs opposing the petition, those of the State and the United States,[1] are: (1) The decision rests on a "fair and substantial basis" of state law; (2) the questions raised are not ripe for review; and (3) in any event, petitioner lacks standing to raise them. Each of these arguments is wrong.

THE COURT BELOW COULD NOT HAVE RELIED ON STATE COMMON LAW TO OVERRIDE STATE STATUTORY LAW

The State and the United States seek to avoid this Court's review by arguing that the California court's new "public trust" pronouncement is based on state rather than federal law. State Br. 9-10, United States Br. 7-9. It is impossible, however, to read the entire decision and logically reach that conclusion.

The United States argues that, because courts are presumed to know the law, it must be assumed the court below recognized that *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), is not a ruling of federal law. United States Br. 8. But the only conclusion which logically flows from the California court's decision is either that it did not know the law or that it simply ignored it.

As pointed out in our petition, California's common law *cannot* override its statutory law. Pet. 9. The court below is presumed to know that basic legal principle also. Therefore, only by relying on *Illinois Central* as constituting *controlling federal authority* could the court below have

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[1] Audubon and its allies, the prevailing parties below, did not file a responsive brief. All the other briefs supported the petition.

rationally overturned the vested, permanent nature of appropriative rights in California, which is established by explicit language in its appropriation statute.

As a result, the holding of this Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) is applicable:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare . . .

Footnote 5 of the State's brief (p. 16) is more pertinent than anything else in either opposition brief. It evidences the State's concern that the decision below could, indeed, be interpreted as having created some new type of "super law" that would interfere with the right of the people of the state to constitutionally or statutorily regulate their affairs. We contend that is the *only* rational interpretation. Like the State, we are unaware of any other court decision which has elevated a common law concept to such a position of preeminence that it supersedes state constitutional and statutory water resource allocation programs. When a state court decision makes such a drastic assertion of judicial authority, when it fails to articulate even the most rudimentary state law support for the assertion, and when it cites a United States Supreme Court case as "the primary authority," App. 24, the logical conclusion is that an overriding federal precedent was believed to control.

THE CALIFORNIA COURT'S DECISION VIOLATED PETITIONER'S DUE PROCESS RIGHTS

In our petition, we argued that the state court's precipitous divestiture of the permanence and certainty of petitioner's water rights was such a sudden, unforeseeable shift in state law, and so without substantial basis, that it amounted to a deprivation of property without due process. Pet. 23-27. Only the State (which in the court below had argued that public trust limitations could *not* be superimposed on vested water rights) has now attempted to defend the decision below as not constituting an unconstitutional taking of water rights, on the ground that it rests on a "fair and substantial basis." State Br. 15.[2] However, the State's present defense of the decision hinges on a gross mischaracterization of its holding.[3]

The State describes the decision as having held "in effect . . . that the public trust doctrine is incorporated in the [state] constitutional test [of reasonable and beneficial use]." State Br. 6. By thus attempting to tie the decision to the well established doctrine of reasonable and

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[2]By contrast, the United States' brief, the only other one opposing the petition, acknowledges that the state court's decision "creates the potential for disruption of what were justifiably thought to be settled water rights" in the West, where "even the creation of a cloud upon such rights is onerous." United States Br. 6-7. The United States' opposition is based, not on any defense of the state court's decision, but on its belief, refuted *infra*, that review is premature at this time.

[3]The State's frank admission of the motivation for its change of position underscores the constitutional dimensions of the issues. Because "it is economically prohibitive for the State to pay compensation to water right holders" who would be affected by the State's reallocation of water supplies, the State seeks a declaration that such reallocation would not violate due process guarantees. State Br. 15-16. But constitutional protection of property rights does not stand or fall depending on the financial impact on the State of its desired property acquisitions.

beneficial water use, the State apparently hopes to avoid the due process issue raised in the petition.

It is obvious that the court below did not base its decision on the doctrine of reasonable and beneficial use. The case as presented to the state court was carefully structured to distinguish *between* that doctrine and the public trust doctrine on which the case was decided.

In its abstention order, the federal district court contrasted the two doctrines and directed Audubon to seek an answer by the state courts as to whether Audubon could rely on the public trust doctrine to the exclusion of the reasonable and beneficial use doctrine:

> [C]an the plaintiffs challenge . . . [Los Angeles'] permits and licenses by arguing that those permits are limited by the public trust doctrine, *or* must the plaintiffs challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not "reasonable or beneficial" as required by the California water rights system?

App. at 61; emphasis added.

Audubon understood the distinction. In its state court complaint it sought "an order from the court that it is entitled to rely upon causes of action based on the public trust doctrine *as distinct from* the doctrines of 'reasonable and beneficial use.'" *National Audubon Society, et al. v. Department of Water and Power of the City of Los Angeles, et al.;* Alpine County Civil No. 639; Complaint for Declaratory Relief filed March 23, 1981, at 6; emphasis added. The difference between the doctrines was also reflected in the decisions of the Alpine County Superior Court (App. 77) and the court below.

The latter specifically pointed out that its decision did *not* rest on the concept of reasonableness. It noted, and

dismissed as irrelevant, a dispute between the parties over the definition of unreasonable use:

> [D]oes it [unreasonable use] refer to only inordinate and wasteful use of water . . . or to any use less than the optimum allocation of water? . . . *In view of our reliance on the public trust doctrine* as a basis for reconsideration of DWP's usufructuary rights, we need not resolve that controversy.

App. at 42, n. 28; emphasis added; *see also* App. 16, 44, and 51.

Only in its final footnote does the State address the decision below as actually written:

> A different and more difficult question might be presented if the lower decision had held that the public trust necessarily exists independently of, and establishes criteria different than, any "reasonable and beneficial use" test established under the California Constitution, a result which would imply that the people lack the power to modify the public trust by state constitutional amendment.

State Br. 16, n. 5.

In short, the State, finding no "fair or substantial basis" in California law which could support the decision below, as written, invented a different holding which would enable it to retain the power accorded it by the decision and "forestall . . . review of the constitutional question." *Fox River Paper Co. v. Railroad Comm'n.*, 274 U.S. 651, 657 (1927).

THE ISSUES PRESENTED IN THE PETITION SHOULD BE DECIDED WITHOUT FURTHER DELAY

The United States concedes that "a drastic systematic redefinition of property rights may in some circumstances be ripe for judicial review under the Fifth and Fourteenth

Amendments before its application to particular property rights has been fully determined." United States Br. 10. Nevertheless, it then takes the position that in this particular instance, "no taking claim is ripe for review at this time." *Ibid.*

The United States never explains why it considers additional state court proceedings essential to this Court's determination of whether the decision below constitutes a sudden and unpredictable change in state law which violates petitioner's due process rights. It only hypothesizes that in applying the new doctrine, state courts might make "compensating adjustments in petitioner's water rights" or "tailor [the] public trust doctrine to avoid taking of particular water rights or to pay compensation in the event of a taking." *Id.* at 11, n. 8. That the United States harbors such hopes reveals its misunderstanding of the decision below.

The essence of the decision was that petitioner *has no vested rights* to divert water and that the determination that petitioner's water rights are subject to the trust is not considered a taking requiring compensation.[4]

The state court's finding that petitioner's water rights are subject to revocation for public trust purposes *precludes by definition* any later finding of a taking requiring the payment of compensation. Accordingly, it cannot rationally be anticipated that the state court may "tailor its

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[4]The court below clearly held that the water right grantee "holds subject to the trust and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or State action to carry out its purposes." App. 30; *see also* App. 4, 29, 43, 48. These citations demonstrate, contrary to the United States' assertion, United States Brief at 13, n. 11, that the court below did consider the taking issue. It ruled that under its explication of the public trust doctrine no taking could occur.

public trust doctrine to avoid [a] taking" which it has already held, by definition, cannot occur.

The State and the United States rely on cases involving governmental *regulation* of property to support their assertion of this case's prematurity. These citations are inapposite. First, this case does not involve the government's right to regulate petitioner's use of its property. Rather, it involves an assertion of governmental power to expropriate the property itself for public use and public benefit. Second, the question presented to this Court is not whether an individual exercise of a conceded governmental power goes too far and crosses the line between permissible regulation and confiscatory taking. Rather, the question is whether the State's arrogation to itself of such power in the first instance violates petitioner's vested property rights. This latter issue is unquestionably ripe for determination.[5]

In this regard, the case is similar to *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Village's adoption of a zoning ordinance was challenged as an unconstitutional invasion of petitioner's property rights. This Court rejected the contention that the challenge was premature, noting that:

> The motion [for dismissal] was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability . . . and the attack is directed, not against any

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[5]The cases cited by the United States (United States Br. 11-12) involve the legality of specific applications of governmental authority, an issue which concededly could not be decided without reference to the individual factual circumstances of each case. Where, as here, however, the issue was the underlying authority of the government to adopt the broad scheme of action, it was considered ripe and was, in fact, decided. See *e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

> specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights. . . . Under these circumstances, the equitable jurisdiction is clear.

Id. at 386.

Similarly, here, the lack of specific enforcement of the public trust to reduce petitioner's diversions is immaterial to a consideration of whether the California court's assertion of the State's power to do so unconstitutionally deprived petitioner of vested rights which it previously enjoyed.

Even more analogous is the recent case of *Nevada v. United States*, ... U.S. ....., 103 S.Ct. 2906 (1983). There this Court's consideration of whether petitioner Truckee-Carson Irrigation District's water rights *could* be reduced consistent with principles of federal law was not deemed premature or unripe in advance of proceedings to determine whether those rights actually *would* be reduced. The same reasons supporting ripeness in that case warrant similar expeditious review here.

No additional proceedings are necessary to enable consideration of the questions presented by the petition. Indeed, speedy consideration by this Court may obviate the need for further proceedings and could forestall the disruptive effect of the state court's decision on California water rights which has already begun to be felt. See, e.g., Brief of Amicus Curiae Metropolitan Water District of Southern California, 13-15.

PETITIONER HAS STANDING TO RAISE THE TAKING ISSUE

The United States further questions "whether [the City] may complain in this Court of a taking by state action." United States Br. 10. Its citation of this Court's decision

in *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), to support its concern indicates both a misunderstanding of *Trenton* and a failure to review the relevant California Constitutional provisions and judicial precedents.

Trenton held that a municipality could not complain of a taking of property by state *legislative* act. The ruling, however, was supported by the specific finding that the New Jersey Legislature possessed the right to create or destroy the municipality and the view that the power to take a portion of its property without compensation was clearly an element of that right. *Trenton's* narrow holding cannot be expanded to a judicial body which does not hold similar life and death powers over the municipality.

Controlling California law also limits the State's "taking" authority to legislative actions. In *Mallon v. City of Long Beach*, 44 Cal.2d 199 (1955), the seminal case in this area, the California Supreme Court ruled:

> [T]he State *acting through the Legislature* has the power to alter contractual or property rights acquired by the municipal corporation. . . .

Id. at 209; emphasis added. Therefore, under California law, the City is not barred from asserting a taking claim based on other than legislative action.[6]

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[6]The United States also overlooks additional language in both the *Mallon* and *Trenton* cases. According to *Mallon*, under Article XI, Section 5 of the California Constitution, even the Legislature's power to take a city's property without compensation is limited to property not used to carry out "municipal affairs." 44 Cal.2d at 209. *Trenton* recognized that a state constitutional provision could safeguard a municipality and grant it self-government powers which are even beyond the control of the legislature, 262 U.S. at 187. The California Constitution affords the City of Los Angeles just such protection and shields it from a State taking of property needed for municipal purposes.

CONCLUSION

The decision below raises important federal questions regarding the public trust and due process protection of water rights. To answer these federal questions, and prevent the turmoil which application of the decision is already causing, petitioner urges this Court to issue a writ of certiorari as prayed.

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